Supreme Court, U.S.
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No. 00-727

In The

Supreme Court of the United States

CLIFFORD D. FRIESE,

Petitioner,

v.

KATHLEEN HAWK, in her official Capacity as the director of the Federal Bureau of Prisons,

Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court exercise its jurisdictional power to resolve the Eleventh Circuit Court of Appeals' erroneous interpretation of 29 U.S.C. §621 et seq., the Age Discrimination in Employment Act; and the Eleventh Circuit's erroneous application of F.R.C.P. 56, the summary judgment standard?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding are contained in the caption of this case.

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OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is unpublished.

2. The Order of the United States District Court for the Northern District of Alabama, Eastern Division, appears at Appendix B to the petition and is unpublished.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §621 et seq., the Age Discrimination in Employment Act (ADEA).

STATEMENT OF THE CASE

This Petition for Writ of Certiorari to the United States Court Supreme Court is limited to the question of whether the district court correctly entered summary judgment against Petitioner, Clifford Friese ("Friese"), ruling that Petitioner failed to make a prima facie case of age discrimination pursuant to the factors set out in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

Petitioner filed suit in the United States District Court for the Northern District of Alabama on November 25, 1997. (R1-1).[1] Friese alleged that the Bureau of Prisons violated his rights under 29 U.S.C. §621, the Age Discrimination in Employment Act (ADEA) by failing to promote him to a higher-classification position and by reassigning him to another job when his previous EEOC lawsuit was dismissed. Defendants filed their answer on February 3, 1998. (R1-2). Defendants filed a motion for summary judgment on December 30, 1998. (R1-24). Friese filed his response to the motion for summary judgment on January 25, 1999. (R1-39).

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[1] The citations are to the Clerk's Docket Entry Sheet for the United States Court of Appeals for the Eleventh Circuit.

The district court entered an order in favor of Defendants on February 12, 1999. (R2-50, R2-51). Friese appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the summary judgment in an order dated March 17, 2000.

Friese, pro se, petitions this Court for writ of certiorari to reverse the decision of the Eleventh Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition to correct the United States Court of Appeals for the Eleventh Circuit's misapplication of 29 U.S.C. §621 et seq. (ADEA) and its erroneous interpretation of the F.R.C.P. 56(c) and Celotex v. Catrett, 477 U.S. 317 (1986) standard for granting summary judgment.

Clifford Friese, a 25-year United States Bureau of Prisons (BOP) employee, sued the BOP for violation of 29 U.S.C. §621 et seq., the Age Discrimination in Employment Act (ADEA). Friese, a now retired GS-9 Counselor, contended that he was over 40 years old and was passed over for several promotions to GS-11 Lieutenant when the positions were arbitrarily preselected by Captain Ron Fulcher; Warden J.L. Sivley; and R.L. Mathews, Regional Director. Friese contended that he suffered retaliation due to his prior EEOC activities, by receiving an unjustified lowest evaluation in his career and an unjustified move from Correctional Supervisor to Correctional Counselor.

To prove a prima facie case of age discrimination, Friese was required to prove (1) that he was a member of a statutorily-protected class, (2) that he applied for and was qualified for the vacancy in question, (3) that he was not selected for the vacancy in question, and (4) that after his rejection, a similarly-situated younger man was selected. McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The district court held (App. B, p. 14) that Friese could not satisfy McDonnell Douglas's second prong because his application for promotion to GS-11 rank was not considered by the BOP Regional Office in

Atlanta. The district court's reasoning (and the Eleventh Circuit Court of Appeals' reasoning in adopting the district court's opinion) is flawed because Friese did not argue that the BOP Regional Office in Atlanta failed to consider his application; rather, Friese argued that BOP personnel at FCI Talladega willfully failed to forward his application to Atlanta in time to be considered, even though Friese's application was timely filed.[2]

On May 29, 1997, the Bureau of Prisons selected an applicant to fill the GS-11 Lieutenant position at FCI Talladega. (Suddeth decl. §3). Friese submitted his application for the position on May 25, 1997. (Friese depo. p. 57). On May 27, 1997, Rita Suddeth, FCI Talladega's personnel officer, reviewed Friese's application and had Friese correct technical errors on the application. (Suddeth decl. par. 5). Friese's application was forwarded by mail to Bureau of Prison officials in Atlanta and received by them on June 2, 1997 (May decl. par. 3); however, the Bureau of Prisons had previously selected a younger applicant on May 29, 1997. (Suddeth decl. par. 3). Suddeth admitted that the Bureau of Prisons does not have a written policy regarding whether an application is "filed" when it is submitted to the prison's personnel office or at the Regional Office. (Suddeth depo. pp. 123-24). Defendant acknowledged (Defendant's trial brief, p. 11) that it was the policy of the BOP Regional Office in Atlanta to accept facsimile copies of applications.

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[2] The courts erred by considering the credibility of Suddeth to be better than the Plaintiff without interviewing both parties.

Further, Friese presented direct evidence that his superiors were motivated by age discrimination against him. The direct evidence was the hostile statements made by Friese's superiors concerning Friese's age. "Direct evidence" is evidence that, if believed, proves the existence of a fact in issue without inference or presumption. Thus, direct evidence relates to actions or statements of the employer reflecting discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee. Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998).

Friese presented credible evidence to the district court that Warden Joe Sivley referred to him as "the old man." (Friese decl. par. 14). He received an e-mail from the Warden stating, "This training shows you can teach an old dog new tricks." (Friese decl. par. 23). A BOP captain referred to Friese as a "dinosaur." (Friese decl. par. 23). The same BOP captain remarked at a wedding reception that someone should give a baby bottle "to Cliffy, he needs it." (Friese decl. par. 22). When Friese was presented with an award for 25 years' service, the same captain stated to all others present that Friese was a "lieutenant with 80 years of service" and called Friese "the oldest living corrections officer." (Id.) The same officer insinuated that March 22, 1813, the date of the Battle of Horseshoe Bend, was Friese's birthday. (Id.)[3] "In concluding that so-called 'hostile

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[3] Bureau of Prisons Programs Statement Human Resources Manual 3000.2 states that subjecting an employee to a Hostile Work environment is prohibited. The Petitioner was subjected to a hostile work environment. Also the defendant accused Friese of

environment' (i.e., non quid pro quo) harassment violates Title VII, the EEOC draws upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Meritor Savings Bank, FSB v. Vinson, 106 S.Ct. 2399, 2415 (1986).

Under F.R.C.P. 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment bears the burden of informing the court of its basis for seeking summary judgment and identifying those portions of the file or pleading which demonstrate the absence of genuine issue of a material fact. Id. All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112,

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unprofessional conduct that did not occur. If an employee commits an infraction to Bureau of Prisons rules and regulations, it must be documented within 15 days, per Bureau of Prisons Program Statement Human Resources Manual 3000.2. If the plaintiff had a poor performance problem, he should have been issued a Performance Improvement Program (PIP) letter according to Federal Bureau of Prisons Program Statement, Human Resources Manual 3000.2. No letter or program was implemented and there was no documented evidence of poor performance. In Reeves v. Sanderson Plumbing Company, 120 S.Ct. 2687, No. 99-536, 2000 Lexis 3966 (rel. June 12, 2000), the plaintiff was subjected to age related derogatory remarks by his employer.

1115 (11th Cir. 1995). In responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. Lewis v. Casey, 518 U.S. 343 (1996).

Clearly, the district court and the United States Court of Appeals for the Eleventh Circuit have departed from the usual and accepted course of judicial proceedings in findings that the evidence when viewed in the light most favorable to Friese, does not establish that Friese applied for and was qualified for the GS-11 promotion. The district court found that Friese had not applied for the promotion. The district court found that Friese had not applied for the promotion, and hence was unable to establish a prima facie case under McDonnell Douglas's second prong. The district court and Eleventh Circuit Court of Appeals have incorrectly applied the Rule 56 summary judgment standard. When viewed in the light most favorable to Friese, Fitzpatrick v. City of Atlanta, supra, the evidence establishes that: (1) Friese submitted his application on May 25, 1997 and corrected his application on May 27, 1997; (2) the application was deemed "filed" as of the day it was given to the FCI Talladega personnel officer; (3) the personnel officer at FCI Talladega could have transmitted a facsimile copy of Friese's application to the BOP Regional Office in Atlanta prior to the Regional Office's promotion meeting; (4) the BOP met subsequent to Friese submitting his application, but did not consider the application because BOP personnel at FCI Talladega had not timely forwarded Friese's application; (5) the warden and captain at FCI Talladega were hostile to Friese and subjected Friese to derogatory age-related comments; and (6) these age-related comments are direct evidence that

the authorities of FCI Talladega were hostile to Friese because of his age.

Lastly, Friese notes that his warden at FCI Talladega also sued his superiors under the ADEA, alleging substantially identical age-discrimination abuses. Under Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2687, No. 99-536, 2000 Lexis 3966 (rel. June 12, 2000), this is indirect or circumstantial evidence which the district court should have considered.

The lower court erred by not allowing the plaintiff to present evidence of past discriminatory acts in order to show a pattern of discrimination. Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2687, No. 99-536, 2000 Lexis 3966 (rel. June 12, 2000); Lewis v. Florida Prison Industries, 786 F.2d 1537 (U.S. Ct. App. 11th Cir. 1986).

The Eleventh Circuit Court of Appeals' opinion is plainly contrary to the letter and spirit of F.R.C.P. 56(c); and is a departure from the usual and accepted course of judicial proceedings with the summary-judgment rule. Therefore, certiorari is due to issue.

CONCLUSION

WHEREFORE, for the above-stated arguments and citations to authority, Petitioner, Clifford Friese, prays that this Court will accept jurisdiction, grant his petition for writ of certiorari, resolve this issue in his favor, and reverse the opinion of the Eleventh Circuit Court of Appeals.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Clifford Friese, Pro se

APPENDIX A

In the United States Court of Appeals
For the Eleventh Circuit

No. 99-6228
Non-Argument Calendar

D.C. Docket No. 97-03079-CV-H-E

CLIFFORD FRIESE,
Petitioner/Appellant,

v.

KATHLEEN HAWK, in her official capacity as the director of the Federal Bureau of Prisons
Defendant/Appellee.

Appeal from the United States District Court
For the Northern District of Alabama

(March 17, 2000)

Before EDMONDSON, HULL and MARCUS, Circuit Judges

PER CURIAM:

We affirm the district court's final order, granting summary judgment to the Director of the Federal Bureau of Prisons, for the reasons set forth in the

district court's thorough and well reasoned opinion of February 12, 1999.

AFFIRMED.

APPENDIX B

IN THE UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

CLIFFORD D. FRIESE, }

Plaintiff, }

vs. }

KATHLEEN HAWK, in her official capacity as Director of the Federal Bureau of Prisons, }

Defendant. }

MEMORANDUM OF DECISION AND ORDER

The court has before it defendant's December 30, 1998 motion for summary judgment. The motion was deemed submitted for decision by the court, without oral argument, on February 1, 1999. Defendant filed evidence in support of her motion and a memorandum of law on December 30, 1998.[1] Plaintiff filed evidence in opposition and a memorandum of law on January 25, 1999.[2]

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[1] Defendant's evidence included declarations of Barry May and Rita Suddeth.

[2] The court granted plaintiff's January 28, 1999 motions and placed under seal designated portions of the evidence submitted by plaintiff on January 25, 1999. See January 29, 1999 Order.

On February 1, 1999 defendant sought leave from this court to file a reply brief and supplemental evidentiary submissions. The defendant's reply brief and supplemental evidence appear to simply respond to issues raised by the plaintiff's brief. Based on the fact that two of the three supplemental exhibits are simply additional pages from depositions previously relied on by both parties and the third exhibit is a policy from a general personnel manual, the court deems it appropriate to allow the reply brief and the supplemental evidence. Defendant's February 1, 1999 motion for leave to file the reply brief and evidentiary submission is **GRANTED**.

Plaintiff commenced this action by filing a complaint on November 25, 1997 alleging that defendant discriminated against him based on his age when he was denied a promotion to the GS-11 Lieutenant position in May of 1997. The complaint also alleges that plaintiff received a low performance evaluation during April of 1997 in retaliation for complaining about the age discrimination.[3] Plaintiff alleges that defendant's actions violated the Age Discrimination in Employment Act, 29 U.S.C. §633a ("ADEA"). Defendant denied plaintiff's allegations in her answer filed February 3, 1998.

In his brief plaintiff alleges that the promotions to GS-11 Lieutenant at FCI-Talladega that plaintiff failed to receive were arbitrarily preselected by Captain R.L. Matthews. As in the complaint, plaintiff

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[3] Due to plaintiff's haphazard style of pleading the court first modified plaintiff's complaint upon defendant's motion to include the appropriate defendant and then prompted plaintiff to dispose of his unwarranted requests for a jury trial, compensatory damages, liquidated damages and punitive damages. See October 14, 1998 Order.

alleges that in retaliation for plaintiff's prior complaints of age discrimination he received an unjustified low evaluation that was the lowest of his career. Additionally, plaintiff now alleges that he suffered an unjustifiable retaliatory reassignment from Correctional Supervisor to Correctional Counsel in January of 1998.

FACTUAL BACKGROUND

In 1997 plaintiff Clifford D. Friese served as a GS-9 Lieutenant at the Federal Correctional Institution in Talladega, Alabama. See Friese decl. At that time plaintiff was over the age of 40. Id. During his employment, plaintiff applied for several promotions. Id. at p. 6. In this case plaintiff's claim of age discrimination is based solely on Friese's application for a promotion to a GS-11 Lieutenant position in May of 1997.[4]

A. The Denial of a Promotion in June of 1997

On May 29, 1997 the Federal Bureau of Prisons selected an applicant to fill the vacant position of GS-11 Lieutenant for the Federal Correctional Institute in Talladega, Alabama ("FCI-Talladega"). See Suddeth decl. p. 3; May decl. p. 3. At that time Brian Ruley, who is under 40 years of age, was promoted from a GS-9 to a GS-11 Lieutenant position to fill the May 1997 vacancy.

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[4] Plaintiff had previously initiated an action in this court concerning the denial of a promotion to a GS-11 vacancy that was filled by Keith Cloud on September 9, 1996. Judge Propst dismissed plaintiff's previous lawsuit (CV97-PT-0294-E) on August 19, 1997 as untimely.

Because the GS-11 Lieutenant vacancy presented a supervisory position the Open-Continuous system was implemented. See Defendant's December 30, 1998 Submission, Ex. 3. Under the Open-Continuous system:

> a. Standard vacancy announcements for supervisory positions are available on SENTRY under Mail ID "BOP Vacancy," copies of these announcements will be permanently posted on bulletin boards maintained by each HRM office.
>
> b. Applicants who wish to apply for any of these positions will complete an open continuous applications form for each type of position and grad level for which they wish to be considered. Specific application requirements are included in the vacancy announcements.
>
> c. Applicants may apply, or change their choice of locations, at any time, however, applications on file as of May 1 each year will be purged and the applicant must reapply to receive continuing consideration. Applications dated by the applicant April 15 or later each year will be considered current and will not be purged on May 1.
>
> d. The servicing HRM office will prepare a complete copy of the application and forward it promptly to each regional office for which the applicant has applied. Service HRM offices are responsible for ensuring that

> the application is complete, current and accurate...
>
> . . .
>
> g. The date a regional HRM office generates a list of applications for a particular location is considered the closing date for receipt of applications. Applications received after that date will not be considered.

See Defendant's Evid. Sub. Of December 31, 1998, Ex. 5.

Ms. Rita K. Suddeth, personnel specialist for FCI-Talladega is responsible for submitting the application paperwork for Open-Continuous vacancy announcements from FCI-Talladega to the appropriate Regional Office. See Suddeth decl. par. 2. Announcements for Open-Continuous positions are posted on the human resource bulletin board located in the employee staff lounge at FCI-Talladega. Id. at p. 3. Pursuant to the Open-Continuous policy set forth above, all paperwork for Open-Continuous vacancies with a date prior to April 15 of each year is purged on May 1st. Id. at p. 4. Any applicant failing to submit new paperwork prior to May 1st is not considered for any Open-Continuous position until updated paperwork is received and processed by the appropriate Regional Office of the Bureau of Prisons. Id. at p. 5.

Plaintiff knew that under the Open-Continuous system all applicant' paperwork dated before April 15th is scheduled to be purged on May 1st and new paperwork must be submitted annually in order to be considered for Open-Continuous positions. See

Friese depo. 49, 57-58. Plaintiff waited until May 25, 1997 to submit his paperwork. Id. at 57; Friese decl.

On May 27, 1997 Suddeth reviewed plaintiff's paperwork and found that the application included a photocopies signature along with a date that was not current.[5] See Suddeth decl. p. 5 & Ex. C. Suddeth informed plaintiff of these problems on May 27, 1997.[6] See Suddeth decl. p. 5.

Plaintiff came to the Personnel Office on the afternoon of May 27, 1997 to remedy the problems by signing and dating the application with the current date.[7] Id. & Ex. C. Suddeth addressed a

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[5] Plaintiff testified that on May 25, 1997 he handed Suddeth his paperwork. See Friese depo. 51. However, as defendant's counsel points out during the deposition, May 25, 1997 fell on a Sunday. Id. Suddeth stated that she found plaintiff's paperwork lying on her desk on May 27, 1997. See Suddeth decl. p. 5. Regardless of how Suddeth received the plaintiff's application, it is undisputed that she did not review it until May 27.

[6] Plaintiff states that Suddeth notified him by leaving a note in his mail box, but never called him at home regarding his application. See Friese decl. p. 11. Suddeth stated that she contacted plaintiff in the morning of May 27, 1997 by telephoning him at home. See Suddeth decl. p. 5.

[7] Plaintiff disputes defendant's characterization of his application as not ready for mailing on May 27, 1997 due to the absence of a current date and genuine signature. Plaintiff points to a document entitled "Position Application/Open-Continuous Announcement" submitted by plaintiff on May 25, 1997 as bearing plaintiff's name and reflecting a date of May 23, 1997. However, the fact remains on the "Amendment to Application" form plaintiff's name had been rewritten and beside the date of November 12, 1995 and new date of May 27, 1997 had been added. See Ex. A to Suddeth decl.; Suddeth depo. 123. Although plaintiff appears to quarrel with the necessity of having him change the date on this form, there is no dispute that his "Amendment to Application form" was a photocopy without an

packet including plaintiff's paperwork to the Southeast Regional Office in Atlanta, Georgia and placed it in the FCI-Talladega mail on May 28, 1997. Id. & Ex. A.

There are no specific dates as to when the Promotion Boards convene.[8] See May decl. p. 4. Suddeth had no knowledge of when the Promotion Board would meet in Atlanta, Georgia to make decisions about applicants for the FCI-Talladega G-11 Lieutenant vacancy.[9] Id. at p. 6; May decl. p. 4. Likewise, plaintiff had not knowledge of when the Promotion Board was meeting or even if there was a vacancy for a GS-11 Lieutenant at FCI-Talladega. See Friese decl. p. 11.

Plaintiff's application was not received in the Southeast Regional Office in Atlanta, Georgia until June 2, 1997. See May decl. p. 3. Therefore, plaintiff's application was never considered by the Promotion Board for the May, 1997 GS-11 vacancy. Id.

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original signature or a current date when he submitted it on May 25, 1997.

[8] Selections through the Open-Continuous system are made upon requests from local institutions. See May decl. p. 4. On May 8, 1997, FCI-Talladega sent a form to the Regional Office requesting selection of a GS-11 Lieutenant. See Suddeth decl. p. 6.

[9] Plaintiff asserts that Suddeth "was aware there was a promotion board" but fails to indicate any factual basis for this statement. See Friese decl. p. 11. Even assuming that Suddeth knew that pursuant to FCI-Talladega's request a promotion board had been designated to review applicants for the GS-11 lieutenant position, from this the court cannot reasonably infer that she knew the decision was being made around the end of May.

B. Evaluation Rating in April of 1997

Plaintiff was consistently rated as "exceeds" in areas of his job performance from April 1995 until March 31, 1996. See Fulcher depo. 78; Friese decl. Ex. E. However, on plaintiff's evaluation for April of 1996 to March 31, 1997, his ratings dropped to "fully successful" in four of the six job performance areas. Id. at 79. Plaintiff points out that this lower rating occurred after he initiated his first EEO activity involving complaints of age discrimination.[10] See Plaintiff's Brief at 26.

It is undisputed that the evaluation process is discretionary and provides for some degree of subjectivity. See Sivley depo., Vo. I at 66-67, 76-77, 80 & 109; Fulcher depo. 66-67. A "fully successful" evaluation is insufficient to propel an employee into the list of "best qualified" applicants for a GS-11 lieutenant position at FCI-Talladega. Id.; Suddeth depo. 65, 71-72; Matthews depo. 38. A rating of "fully successful" means that an employee is performing at a basic level by doing exactly what is required in the position. See Sivley depo., Vol. I at 64 & 72. Captain Fulcher evaluated plaintiff and testified that plaintiff had not done "too much above and beyond the call of duty" during the rating period reflected in the April 1997 evaluation. See Fulcher depo. 80 (Plaintiff's Ex. 103). A rating of "exceeds" reflects when an employee goes above and beyond

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[10] Plaintiff's first EEO Complaint occurred while plaintiff was stationed at another FCI facility. This complaint resulted in his promotion to a GS-9 Lieutenant and a transfer to FCI-Talladega. On October 7, 1996 plaintiff filed a Notice of Intent to Sue in relation to the Cloud promotion at FCI-Talladega, which was the subject of his earlier lawsuit.

the standards in his position description and provides more points in scoring the applicants for the best qualified list. See Sivley depo., Vol. I at 65; Fulcher depo. 105.

Warden Joe L. Sivley's testimony concerning plaintiff's performance undergirds Fulcher's evaluation. Sivley described plaintiff as unequivocally the laziest lieutenant that has ever worked for Sivley. See Sivley depo. 38. According to Sivley, plaintiff likes to sit in the office and the shoot the breeze despite being told numerous occasions to get out and about. Id.

C. Transfer in January of 1998 to Counselor Position

In January of 1998 plaintiff was transferred from Correctional Supervisor (GS-9) to Correctional Counselor (GS-9) at the request and recommendation of Warden Sivley.[11] See Sivley depo., Vol. I at 71. This move divested plaintiff of his supervisory responsibility. See Fulcher depo. 99. However, the Bureau of Prisons' policy provides that employees may be reassigned from one position to another of the same grade level, based on the needs of the service. See Bureau of Prisons Program Statement 3000.02, Human Resource Management Manual (Suddeth Attach., Ex. 3 of Defendant's Feb. 1, 1999 Submission).

Friese did not desire to be moved to the new position. See Sivley depo., Vol. I, at 75. Plaintiff

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[11] Plaintiff points out that the paperwork indicates that the transfer was requested by Talladega Associate Warden Gwen Taylor and then authorized by Sivley. See Plaintiff's Evid. Sub., Ex. 128.

retired from employment with the Federal Bureau of Prisons in December of 1998.

Prior to the reassignment of plaintiff, there was no documentation of any incidents or complaints regarding plaintiff's performance, other than any comments in his performance evaluations. See Sivley depo., Vol. I at 77. Plaintiff's file included no memos and no performance improvement letters (PIPs) prior to the reassignment. Id. at 111-12.

Sivley testified that he telephoned Matthews to get his concurrence on reassigning plaintiff.[12] See Sivley depo. 124. In reality Matthew as Regional Director approved the reassignment upon Sivley's recommendation and request. See Sivley depo. 71. No written documentation was prepared for the Regional Director in support of Sivley's request to reassign plaintiff. Id. at 78. At the time this reassignment was approved, Matthews had no knowledge concerning plaintiff's age discrimination claim or pending lawsuit. See Matthews depo. 37 (Plaintiff's Evid. Sub., Ex. 120).

II. LEGAL ANALYSIS

A. Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See

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[12] Matthews only vaguely remembers the conversation with Sivley concerning the reassignment. See Matthews depo. 32-34.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party asking for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings or filings, which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the moving party has met his burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his own affidavits, or by the depositions, answers to interrogatories, and admissions to file, designate specific facts showing that there is genuine issue for trial. Celotex, 477 U.S. 324.

The substantive law will identify which facts are material and which are irrelevant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All reasonable doubts about the facts and all justifiable inference are resolved in favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Id. at 249.

The method used by the party moving for summary judgment to discharge its initial burden depends on whether that party bears the burden of proof on the issue at trial. See Fitzpatrick, 2 F.3d at 1115-17 (citing United States v. Four Parcels of Real Property, 941 F.2d 1428 (11th Cir. 1991) (en banc)). If the moving party bears the burden of proof at trial, then it can only meet its initial burden on summary judgment by coming forward with positive evidence demonstrating the absence of a genuine issue of

material fact; i.e. facts that would entitle it to a directed verdict if not controverted at trial. Fitzpatrick, 2 F.3d at 1115. Once the moving party makes such a showing, the burden shifts to the non-moving party to produce a significant, probative evidence demonstrating a genuine issue for trial.

If the moving party does not bear the burden of proof at trial, it can satisfy its initial burden on summary judgment in either of two ways. First, the moving party may produce affirmative evidence negating a material fact, thus demonstrating that the non-moving party will be unable to prove its case at trial. Once the moving party satisfies its burden using this method, the non-moving party must respond with positive evidence sufficient to resist a motion for directed verdict at trial.

The second method by which the moving party who does not bear the burden of proof at trial can satisfy its initial burden on summary judgment is to affirmatively show the absence of evidence in the record to support a judgment for the non-moving party on the issue in question. This method requires more than a simple statement that the non-moving party cannot meet its burden at trial but does not require the movant to point out to the district court that there is an absence of evidence to support the non-moving party's case. Fitzpatrick, 2 F.3d at 115-16. If the movant meets its initial burden by using this second method, the non-moving party may either point out to the court record evidence, overlooked or ignored by the movant, sufficient to withstand a directed verdict, or the non-moving party may come forward with additional evidence sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency. However, when

responding, the non-movant can no longer rest on mere allegations, but must set forth evidence of specific facts. Lewis v. Casey, 518 U.S. 343 (1996).

B. Plaintiff's Age Discrimination Claim – Denial of Promotion to GS-11 Lieutenant in May of 1997

The essence of plaintiff's main argument in his brief comes down to his assertion that because his application was timely submitted to the best of his knowledge or in his own opinion, then the failure to consider him must be age discrimination. Furthermore, plaintiff points to evidence of some comments concerning him and the person who received the promotion that could possibly be interpreted as age-related and holds them out as direct evidence of discrimination.

The court will first consider whether the plaintiff can survive summary judgment based on circumstantial evidence under the McDonnell Douglas analysis. Archambault v. United Computing Systems, Inc., 786 F.2d 1507, 1512 (11th Cir. 1986). In order to present a prima facie case of age discrimination plaintiff must establish (1) that he is a member of a statutorily protected class; (2) that he applied and was qualified for the vacancy in question; (3) that he was not selected for the vacancy in question; and (4) that after his rejection, a similarly situated younger individual was selected. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (emphasis added). Defendant argues that plaintiff cannot establish the second element due to plaintiff's submission of his application after the promotion decision had been made and thus disqualifying him from consideration.

Plaintiff asserts that the application should be treated as filed when it was received at the personnel office in FCI-Talladega rather than when received by the Regional Office in Atlanta. Alternatively, plaintiff contends that Suddeth could have faxed his paperwork to Atlanta in time for the Promotion Board's consideration. See Friese decl. p. 11.

Regardless of when plaintiff's application was filed, there is no dispute that the Promotion Board who rendered the decision on the May 1997 promotion to GS-11 did not have before them plaintiff's application. At various places within plaintiff's submissions he asserts that the defendant intentionally withheld his application to prevent him for being considered for the May 1997 promotion, but fails to prevent any evidence to prove any intentional action on the part of the defendant in relation to the alleged mishandling of his application.

Although the unavailability of plaintiff's application may be the responsibility of someone other than plaintiff, absent proof that another Federal Bureau of Prisons' representative intentionally withheld the application in order to preclude plaintiff for consideration because of his age, the problems in responsible handling of plaintiff's application fail to rise to the level of sufficient circumstantial evidence to infer age discrimination. The record presented to this court is void of any evidence that an agent of defendant intentionally withheld or otherwise obstructed plaintiff's application for the promotion at issue.

Furthermore, even if the court were to find that some evidence of an intentional interference with

plaintiff's application for the promotion, plaintiff must also produce evidence to indicate that this intentional conduct was motivated by plaintiff's age. Clearly there has been no evidence to demonstrate that Suddeth or anyone involved in the processing of Plaintiff's application demonstrated a discriminatory animus against plaintiff because of his age. The mere fact that plaintiff was not in fact considered as applying or qualified for the G-11 lieutenant vacancy in question prevents him from being able to assert a prima facie case.

Even if the court were to assume that plaintiff had presented a prima facie case, defendant relies on the absence of plaintiff's application for consideration by the Promotions Board as a legitimate non-discriminatory reason for his rejection. Plaintiff must then present evidence that the employer's articulated reason is pretextual for discrimination or additional evidence of discriminatory animus to avoid summary judgment. Combs v. Plantation Patterns, 106 F.3d 1519, 1532 (11th Cir. 1997).

In an attempt to prove pretest or otherwise prove discrimination plaintiff appears to convert allegations by plaintiff in his prior lawsuit and allegations by Sivley to factual evidence.[13] The mere fact that

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[13] Sivley's complaints that the Bureau of Prisons employs the "buddy system" in promotion selections, "play(s) favorites," resulting in "inside selections of people who are liked," and "deceitfully promote(s) whomever they wish" fail to provide proof of age discrimination. See Sivley depo., Vol. II, at 46, 50-51 & 65 (Plaintiff's Evid. Sub. Exs. 16 & 22). Sivley also makes a statement during his deposition that it took the Bureau of Prisons Executive Staff approximately 22 years before they fully complied with all the legal requirements relating to veterans. See Sivley depo., Vol. II, at 55. While actual evidence of improper treatment of veterans might in certain circumstances provide

plaintiff made similar allegations concerning an earlier promotion denial and that Sivley personally sued his superiors for age discrimination and retaliation is not evidence of discrimination. Only actual facts supporting these claims would be relevant evidence.[14] Although plaintiff gives his personal characterization of a comparison between his qualifications and those of Cloud, the recipient of the earlier promotion, there are no supporting documents objectively setting forth these facts. See Friese decl. pp. 9 & 10. Plaintiff's brief is long on allegations and short on any real facts concerning these other lawsuits.[15]

Plaintiff also makes broad statements indicating that all younger, less experienced, less qualified GS-9 Lieutenants in his department were promoted to GS-11 Lieutenant positions, while he was passed over. See Friese decl. p. 12 & 13. However, plaintiff points out that at least one GS-9 Lieutenant that was over 40, Don Haywood, was promoted to GS-11 Lieutenant more recently. Id. at p. 12. Plaintiff also states that lieutenants over 40 receive less incentive

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proof of an animus to discriminate based on age, this cursory statement is insufficient to even provide a reasonable inference to age discrimination in this case.

[14] The court need not address the res judicata argument set forth by defendant concerning the earlier lawsuit between the parties involving the Cloud's promotion to G-11 Lieutenant. While plaintiff discusses the allegations in that case, he has failed to come forward with any substantive evidence from the Cloud promotion for consideration by the court at this time, other than Sivley's reference to Cloud as "young."

[15] In his deposition Sivley admits that he has a lot of allegations but no proof that the Bureau of Prisons used an illegal preselection process for promoting candidates within the Bureau. See Sivley depo., Vol. II, at 64.

awards and more disciplinary action than those under 40 years of age, while those lieutenants over 50 receive no incentive awards or promotions.[16] Id. at pp. 13 & 21. These general statements unaccompanied by factual evidence fail to provide evidence sufficient to support an inference of age discrimination or to disprove the legitimate non-discriminatory reason given by defendant.

Alternatively, plaintiff asserts that he has presented proof that qualifies as direct evidence of discriminatory intent.[17] Carter v. City of Miami, 870

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[16] Captain Fulcher testified that receipt of award provides points that assist in making the best qualified list for promotions. See Fulcher depo. 101-02. (Plaintiff's Evid. Sub., Ex. 127). Therefore, if proven these allegations might relate to plaintiff being denied promotions.

[17] According to plaintiff, Warden Sivley referred to him as "the Old Lieutenant." See Friese decl. p. 14. Also plaintiff received an e-mail message from Warden Sivley stating: "This training shows you can teach an old dog new tricks." Id. at p. 23. Additionally, plaintiff points to the fact that Sivley referred to the person who received the promotion at issue, ruley, as "a young, upcoming Lieutenant, very sharp, very energetic about his duties." See Plaintiff's Evid. Sub. Ex. 4. When referring to another person, J. Bryant, who is 48 years old Sivley called him a "spindly, old man." See Friese decl. p. 23.

Plaintiff also states that Captain Fulcher called me a "broke dick" and a "dinosaur." Id. According to plaintiff, while attending a wedding of two staff members Captain Fulcher remarked "give this [a baby bottle] to Cliffy, he needs it." See Friese decl. p. 22. When plaintiff was presented an award for 25 years of service Fulcher stated to all present at the correction officers' retreat that plaintiff was a "lieutenant with 80 years of service" and referred to plaintiff as "being the oldest living correctional officer." Id. Fulcher also insinuated that March 22, 1813, the date of the Battle of Horseshoe Bend, was plaintiff's birthday. Id. Age-related statements by Hoffman, Alberts and Baker are particularly irrelevant due to the absence of any evidence that they served as decisonmakers in relation to the challenged

F.2d 578, 581 (11th Cir. 1989). The court need not consider this evidence due to a threshold barrier prevent such statements from proving plaintiff's claim. Because plaintiff was not an applicant considered by the Promotion Board for the vacancy at issue there was no actual employment decision to challenge. It is impossible for plaintiff to prove that Sivley and Fulcher were de facto decisionmakers in an non-existent decision.[18] Thus, proof of a discriminatory animus concerning age, even in the form of direct evidence, when accepted as true is not sufficient to support plaintiff's age discrimination claim for the challenged promotion in this case.

Based on the foregoing, plaintiff has failed to demonstrate that a material issue of fact exists and defendant is entitled to judgment as a matter of law on plaintiff's age discrimination claim. Defendant's December 30, 1998 motion for summary judgment is due to be granted as to plaintiff's claim of age

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employment decisions and due to the absence of any hostile environment claim. Likewise proof of inappropriate sexual, gender-related and race-related statements by Fulcher are not particularly relevant to plaintiff's age discrimination and retaliation claims.

[18] Even when accepting proof by plaintiff that Warden Sivley and Captain Fulcher have significant input on promotion decisions based on their recommendations to the Promotion Board, such input does not occur until the Promotions Board receives applications, reviews those applications and formulates a best qualified group. See Matthews depo. 8-11. In this case plaintiff's application was never submitted prior to the decision at issue and thus the process never progressed to the point of decisive input by Sivley or Fulcher in relation to plaintiff's application for the promotion at issue. Fulcher testified that plaintiff's name was not on the best qualified list for the promotion at issue. See Fulcher depo. 50 (Plaintiff's Evid. Sub., Ex. 56).

discrimination in relation to the May 1997 GS-11 Lieutenant promotion at FCI-Talladega.

C. Plaintiff's Retaliation Claims.

Plaintiff asserts that defendant retaliated against him by Captain Ron Fulcher evaluating plaintiff as "fully successful" rather than "exceeds" in April of 1997 and by Warden Sivley transferring plaintiff to a Correctional Counselor position in January of 1998. Throughout his submissions plaintiff describes the April 1997 evaluation as the worst of his career.[19] However, when compared with other evaluations it appears to be merely a step down on a progression of downward sloping ratings.[20]

In order for plaintiff to establish a prima facie case of retaliation, he must show: (1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some casual relationship between the two events. Holifield v. Reno, 115 F.3d 1555, 1566 (11th Cir. 1997). Defendant argues that the April 1997

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[19] In particular, plaintiff takes issue with the change in his rating as to his presence within the institution as dropping from "exceeds" to a "fully successful" rating. See Plaintiff's Brief at 25; Fulcher depo. 75-76; Sivley depo., Vol. I at 38.

[20] For instance, in the "Performance Entry Log" for September 30, 1996 plaintiff received a "fully successful" rating in the areas of "plans, monitors and evaluates" as well as "maintains and provides expertise." See Friese decl., Ex. E. Then in a "Performance Entry Log" for January 6, 1997 plaintiff received a "fully successful" rating in both the two previously mentioned areas and in the communication area, as well as the "maintain security of the institution" area. Id. Back on June 19, 1995 plaintiff had also received ratings of "fully satisfactory" on his "Performance Entry Log" in the areas of "maintains and provides expertise" and communication. Id.

evaluation of plaintiff does not constitute an adverse employment action due to the absence of any proof of loss in pay.

Plaintiff asserts that this lower evaluation precluded him from being placed on the best qualified list for the May 1997 promotion and thus prevented his promotion to a GS-11 lieutenant. Captain Fulcher admitted that quality step increases impact on scoring process for promotions and are directly impacted by the subjective evaluation process. See Fulcher depo. 101-02. Plaintiff also presented evidence that a person with a "fully successful" rating is unlikely to be selected for the best qualified list for a promotion. See Matthews depo. 38 (Plaintiff's Evid. Sub., Ex. 98); Suddeth depo. 71-72 (Plaintiff's Evid. Sub., Ex. 107). The court concludes that a lower job performance rating shown to be viewed objectively as negative and alleged to be unwarranted provides a sufficient adverse employment action for plaintiff's prima facie case of retaliation. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).

Similarly defendant points to the transfer as not qualifying as an adverse employment action because it involves the same pay grade and the applicable policy freely allowed for such transfers. See Bureau of Prisons Program Statement 3000.2, Human Resource Management Manual (Suddeth Attach., Ex. 3 of Defendant's Feb. 1, 1999 Submission). However, it is undisputed that plaintiff lost all supervisory responsibility with this reassignment. See Fulcher depo. 99. Additionally, defendant has not controverted plaintiff's statement that he lost $2,000 in Sunday pay, holiday pay and night differential. See Friese decl. p. 14. Based on this

evidence the court concludes that the reassignment in this case provides a sufficient showing of an adverse employment action to satisfy plaintiff's prima facie case for retaliation. Wideman, 141 F.3d at 1456. There is no dispute of plaintiff's involvement with protected activity and no arguments raised by defendant in relation to the casual connection element.[21]

Next defendant asserts that even if plaintiff has presented a prima facie case of retaliation defendant has proffered a legitimate, non-discriminatory reason applying to both the evaluation ratings and reassignment. Defendant asserts that plaintiff's dissatisfactory performance during the relevant time period provides the legitimate non-discriminatory reason for the lower evaluation in April of 1997 and his January 1998 reassignment to Correctional Counselor.

In plaintiff's April 1997 evaluation Captain Fulcher commented that plaintiff "needs to devote more time to patrolling his areas of responsibility and interacting with the inmate population." See

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21 According to documents from the EEO investigation by the Department of Justice, the Federal Bureau of Prisons received notice of plaintiff's Intent to File a Civil Action on October 21, 1997 concerning the Cloud promotion. See Plaintiff's Evid. Sub., Ex. 4. While plaintiff has participated in prior EEO complaints, the allegations and activities involved a different FCI facility and resulted in his transfer to FCI-Talladega with a promotion to GS-9 Lieutenant. It appears undisputed that at least certain agents of defendant were aware of plaintiff's EEO activity at the time of the April 1997 evaluation. Since the reassignment of plaintiff to the counselor position occurred after this lawsuit was initiated, it can also be assumed that defendant or an authorized agent of defendant knew of plaintiff's EEO activity in relation to this suit prior to the reassignment.

Plaintiff's Ex. G. Captain Fulcher testified that plaintiff had a tendency to stay in his office too much and talk on the phone too much when he needed to be out patrolling the yard and interacting with the inmate population.[22] See Fulcher depo. 53. Sivley testified that he moved plaintiff to the counselor job because plaintiff was not out and about in the institution. Id. at 75-76. Warden Sivley explained that a few days prior to the reassignment, he observed plaintiff "shooting the breeze" with some other staff members and then on the phone for "awhile." See Sivley depo. 69-70. When Warden Sivley returned two and a half hours later to plaintiff's office "[t]he only change Mr. Friese had made at that time was he now had his feet up on the desk versus just sitting in the chair." See Sivley depo. 70. According to Sivley this was simply one incident in the context of numerous occasions where plaintiff had been observed in this manner. Id. 75-76.

Sivley testified that plaintiff's reassignment was for the "betterment of the institution" by matching plaintiff's talents with the position's needs. See Sivley depo., Vol. I, at 75; Plaintiff's Ex. D. Additionally, Sivley testified that inmates had complained about plaintiff's derogatory language and his use of spit can while behind the serving line in the dining hall when he was out and about among the inmate population. Id.

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[22] Plaintiff takes issue with his failure to move about being a legitimate non-discriminatory reason for the transfer based on Sivley's indicating during his deposition that plaintiff was the only employee he had this problem with, while Sivley circulated a memo written by him dated May 2, 1997 addressed to all lieutenants about this problem. See Silvey depo. Vol. III, Ex. 9 (Plaintiff's Evid. Sub., Ex. 113).

Plaintiff must demonstrate that defendant's proffered explanation for the evaluation and reassignment is pretext for retaliation. Meeks v. Computer Assoc. Int'l., 15 F.3d 1013 (11th Cir. 1994). Plaintiff asserts that his performance appraisals reveal that he was consistently out and about in the institution during his shift. See Friese decl. However, when reviewing the performance appraisals the court finds nothing around the relevant time period that contradicts Fulcher's and Sivley's testimony about plaintiff's failure to circulate through the prison and the inmate population. Plaintiff presents no evidence to disprove that he was talked to on several occasions about getting out and about in the prison on a more regular basis. For an employer to prevail in an employment discrimination case "the jury need not believe that the employer was correct in its assessment of the employee's performance, it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory." Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (other citations omitted). Logically on a motion for summary judgment defendant is entitled to judgment as a matter of law if plaintiff fails to set forth evidence upon which a reasonable juror could infer that the employer did not believe in good faith that the plaintiff's job performance was unsatisfactory.

Plaintiff points out that neither Sivley or Fulcher memorialized any complaint or concern by a written reprimand or performance improvement plan (PIP) in his record. While the absence of written documentation is relevant it is insufficient in and of itself to meet plaintiff's burden of presenting evidence

that would allow a reasonable juror to discredit defendant's assertion that she took these actions against plaintiff because she found plaintiff's performance to be unsatisfactory.

Plaintiff puts emphasis on the uniqueness of his reassignment by pointing to Captain Fulcher's testimony that plaintiff is the only employee under his supervision who has been reassigned from Correctional Supervisor to Correctional Counselor. See Fulcher depo. 86. However, according to Warden Sivley plaintiff was a unique employee in that Sivley identified him as the laziest lieutenant that had ever worked for him. See Sivley depo. 38.

In his submissions plaintiff devotes considerable time criticizing the subjective nature of the evaluation process and depicting the decision making process within FCI-Talladega as a "buddy system" where the people "they" like get ahead. While it is true that use of subjective criteria for personnel decisions creates a risk for discrimination, supervisory jobs often must be evaluated based on subjective assessments rather than quantitative numbers, such as how may widgets were produced. The mere fact that Fulcher had the opportunity to use his discretion and apply subjective criteria in the evaluation process does not render a low evaluation or reassignment retaliatory.

"Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather, our inquiry is limited to whether the employer gave an

honest explanation of its behavior." Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting Mechniq v. Sears, Roebuck & Co., 864 R.2d 1359, 1365 (7th Cir. 1988)). While the court's acceptance of the picture plaintiff paints as to the dynamics within FCI-Talladega would bring into focus a setting that likely fosters favoritism and inequities due to personal preferences, such a situations falls short of presenting sufficient evidence to preclude summary judgment on plaintiff's retaliation or age discrimination in this case.

Based on the foregoing defendant's motion for summary judgment as to plaintiff's retaliation claims is due to be granted. The court concludes that no material issue of fact remains in this matter. A separate order will be entered.

DONE this 12th day of February, 1999.

/s/ James H. Hancock
James H. Hancock
Senior United States
District Judge